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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 65

PERCIVAL E. MAGEE, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 25, 1930

CERTIORARI GRANTED MAY 19, 1930

(34,892)

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SUPREME COURT OF THE UNITED STATES

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No. 761

PERCIVAL E. MAGEE, PETITIONER,

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 761

PERCIVAL E. MAGEE, Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petitioner, Percival E. Magee, respectfully shows to this Honorable Court:

A.

The first question involves the statutory authority for the suit against the United States and the meaning and legal construction of the words "claims * * * against the United States" as used by Congress in Section 145 of the Judicial Code and the words "erroneously or illegally assessed or collected" as used in Section 3226 Revised Statutes, and the meaning and legal construction of the words "an overpayment" of tax and the clause "which [fol. 2] shall be credited or refunded" as used by Congress in Section 607 of the Revenue Act of 1928 (45 Stat. 874); and a determination whether the consent of the United States to be sued is given by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes, or by Section 607 of the 1928 Act.

The second question involves the meaning and legal construction of Section 611, entitled "Collection Stayed by Claim in Abatement," of the Revenue Act of 1928 (45 Stat. 875), and a determination of the meaning and legal construction of the clause "if a claim in abatement was filed"; the clause "within the period of limitation properly applicable thereto, assessed"; the clause "and if the collection

of any part was stayed"; and of the words "the payment of such part"; and a determination whether a legal claim in abatement was filed, whether the tax in question was assessed within the limitation period, whether the collection was stayed by a claim in abatement and whether the tax was paid in the manner contemplated by Congress.

The third question involves the constitutionality of Section 611 of the Revenue Act of 1928 as applied to the facts in this case; and a determination of the extent of the powers of Congress under the Sixteenth Amendment "to lay and collect taxes on incomes" and a determination whether or not the petitioner has been deprived of his property without due process of law or his property has been taken without compensation in violation of the Fifth Amend-
[fol. 3] ment.

The fourth question involves the meaning and legal construction of Section 9(a) of the Revenue Act of 1916 (39 Stat. 763), and of the words "shall be determined and assessed" as used by Congress in Section 250(d) of the Revenue Act of 1921 (42 Stat. 265, 266), to determine the retroactivity of the latter section and the legality of an assessment made after the expiration of the three-year period defined in Section 9(a) of the Revenue Act of 1916 and before the enactment of the Revenue Act of 1921.

Statement

The petitioner filed his income tax return for the calendar year 1916 on February 27, 1917, and reported therein a tax in the amount of $10,419.35. On November 15, 1920, and after the expiration of the three-year period prescribed in Section 9(a) of the Revenue Act of 1916 (39 Stat. 763), the petitioner signed a document and waived the three-year limitation period as to assessment of additional tax in the amount of $6,911.30. This document was later signed by the Commissioner of Internal Revenue.

During the month of October, 1921, the Commissioner of Internal Revenue assessed additional tax in the amount of $64,982.12 instead of the said sum of $6,911.30. The claimant on November 15, 1921, filed a claim in abatement in the said amount of $64,982.12.

On receipt of a claim in abatement, it was common practice to hold up the collection of an additional assessment.

The collector of internal revenue acted in accordance with this practice in this case, and in the exercise of his discretion actually held up the collection of the additional assessment, and forwarded the said claim to the Commissioner of [fol. 4] Internal Revenue in due course.

On February 12, 1924, the Commissioner of Internal Revenue allowed the said claim in abatement in the amount of $21,952.28 and rejected it in the amount of $43,029.84.

On May 13, 1924, the collector made demand on the petitioner for the payment of the said sum of $43,029.84, which said sum, together with interest thereon in the amount of $4,841.19, was discharged by payments made on May 23, 1924, June 17, 1924, and July 11, 1925.

B.

Reasons for the Allowance of the Writ

1. The decision of the court below, with reference to the statutory authority for the suit, conflicts directly with the prior decision of that court in the case of Rock Island, Ark. etc. R. Co. v. United States, 54 Ct. Cl. 22, aff'd 254 U. S. 141, and with the decisions of this Court in the cases of Real Estate Savings Bank v. U. S. 104 U. S. 728; United States v. Houslef 237 U. S. 1; and United States v. Emery, Bird, Thayer Realty Co. 237 U. S. 28.

2. This case is of public importance because the holding of the court below, that it has authority to determine an overpayment of tax and to make a credit or refund under Section 607 of the Revenue Act of 1928, amounts to an invasion of the powers of the Executive under Article II of the Constitution.

[fol. 5] 3. The questions involved in this case with reference to Section 611 of the Revenue Act of 1928 are substantially the same as those involved in the case of Graham and Foster Co-partners etc., petitioners, v. Goodcell, Collector, No. 589, October 1929 Term, in which case this Court has granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

4. The decision of the court below with reference to Section 611 conflicts directly with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of United States v. Burden, Smith & Co., 33 Fed. (2d) 229.

5. The decision of the court below that the provisions of Section 250(d) of the Revenue Act of 1921 are to be construed to be retroactive to apply to an assessment previously made nullifies the clearly expressed intent of Congress, in the use of the words "shall be determined and assessed," that the provisions of the section should have application to subsequent assessments only made in the manner therein defined.

6. Assuming the provisions of Section 250(d) of the Revenue Act of 1921 are to be construed to be retroactive, then the holding of the court below, that the claim in abatement was lawfully filed, conflicts with the clearly expressed intent of Congress in Section 250(d) that "no claim in abatement * * * shall be entertained".

7. The holding of the court below that the word "stayed" is not to be given its ordinary or legal meaning is contrary to the clearly expressed intent of Congress as appears in Section 611 of the Revenue Act of 1928.

[fol. 6] 8. The holding of the court below that stay need not follow or result from the filing of the abatement claim conflicts with the title of Section 611 "Collection stayed by claim in abatement".

9. The conclusion of the court below that the collection of the tax was in fact stayed is contrary to the special finding of fact that the collector of Internal Revenue "in the exercise of his discretion actually held up collection".

10. The question of the constitutionality of Section 611 of the Revenue Act of 1928 is similar to that raised in the case of Graham and Foster, etc., petitioners, v. Goodcell, Collector, supra.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued out of and under seal of this Honorable Court, directed to the Court of Claims of the United States, commanding that court to certify and send

to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the Record and all proceedings in the case numbered and entitled on its docket, No. J-675, Percival E. Magee, Claimant, v. The United States, and that the finding of the Court of Claims may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Percival E. Magee, Petitioner, by Theodore B. Benson, Counsel for Petitioner.

[fols. a & 1] IN THE COURT OF CLAIMS

No. J-675

PERCIVAL E. MAGEE, Claimant,

v.

THE UNITED STATES OF AMERICA

I. PETITION—Filed December 12, 1928

To the Court of Claims of the United States and to the Honorable the Chief Justice and Judges thereof:

The above claimant by this, his petition, respectfully shows:

1. The claimant is a citizen of the United States and a resident of the State of California with post office address at 409 Hollywood Security Building, Los Angeles, California. During the year 1916 and at the time of the filing of the income tax return hereinafter referred to the claimant was a resident of the State of California with post office address at Los Angeles, California.

2. The claimant has a just claim for refund of $47,871.03, being the additional taxes and interest thereon, paid to the Collector of Internal Revenue for the 6th District of California, on the dates hereinafter mentioned, as additional individual income and surtaxes and interest thereon, for the

calendar year 1916, which said sum was wrongfully assessed and collected by the Commissioner of Internal Revenue of the United States.

[fol. 2] 3. The provisions of law under which such wrongful assessment and collection were made are contained in Section 1 of an Act of Congress approved September 8, 1916, entitled "An Act to Increase the Revenue, and For Other Purposes" and known as the Revenue Act of 1916.

4. The provisions of law under which the claimant claims such refund are contained in Section 9(a) of the Revenue Act of 1916, Section 250(d) of an Act of Congress approved November 23, 1921, entitled "An Act to Reduce and Equalize Taxation, to Provide Revenue, and For Other Purposes" and known as the Revenue Act of 1921 and Section 3226 of the Revised Statutes of the United States.

5. Pursuant to the provisions of Section 3173 of the Revised Statutes of the United States, as amended, and of other acts of Congress made and provided, the claimant, on February 27, 1917, and on official form No. 1040 made to the Commissioner of Internal Revenue his return of income and surtaxes for the said calendar year 1916 and reported therein the full sum of $10,419.35, which said sum was fully paid to the Collector of Internal Revenue for the 6th District of California within the time prescribed by law.

6. The Commissioner of Internal Revenue audited and revised the return of income and surtaxes so filed by the claimant and determined additional tax due in the amount of $6,911.30, as to which said sum the claimant and the Commissioner of Internal Revenue in a document dated November 15, 1920, agreed to waive the three-year Statute of Limitations as to the assessment of additional tax as provided [fol. 3] in said Section 9(a) of the said Revenue Act of 1916, a copy of which said document is annexed hereto as Exhibit "A."

7. Thereafter the Commissioner of Internal Revenue made a further examination and redetermined the amount of the additional tax to be $64,982.12, which said sum the Commissioner of Internal Revenue assessed on the October, 1921, list. On November 15, 1921, the claimant filed a claim

in abatement of the said sum of $64,982.12, which said claim was considered by the Commissioner of Internal Revenue and by letter dated April 19, 1923, the taxpayer was advised that the said claim would be allowed in the amount of $21,-952.28 and rejected in the amount of $43,029.84, and said amount was actually rejected by the Commissioner of Internal Revenue under date of February 12, 1924.

8. The assessment having been transferred to the Collector of Internal Revenue for the 6th District of California at Los Angeles, California, the said Collector for which District on May 13, 1924, made demand on the claimant for the said sum of $43,029.84, which said demand was discharged by the payment of $28,864.34 tax and $1,135.66 interest on May 23, 1924, and the payment of $11,116.26 tax and $3,039.62 interest on June 17, 1924, and by the payment of $3,049.24 tax and $665.91 interest on July 11, 1925, making a total payment of additional tax in the amount of $43,-029.84 and of interest in the amount of $4,841.19 or a total of tax and interest of $47,871.03.

9. On information and belief the claimant avers that the said sums so paid as original tax to the Collector of Internal Revenue for the 6th District of California and as ad-[fol. 4] ditional tax to the Collector of Internal Revenue for the 6th District of California were by the said officials turned over to and deposited in the Treasury of the United States as in the usual course of the business of such officials.

10. Pursuant to the provisions of Section 3220 of the Revised Statutes of the United States as amended, and pursuant to the provisions of other acts of Congress and on December 12, 1927, the claimant duly filed with the said Collector of Internal Revenue for the 6th District of California at Los Angeles, California, a claim for refund in the amount of $47,205.12, or such greater amount as is legally refundable, purporting to represent the said additional tax paid in the amount of $43,029.84 and interest paid thereon. The basis of such claim is that the said additional tax and interest was illegally collected from the claimant after the expiration of the statutory period in which the Commissioner of Internal Revenue could legally make such collection.

11. The Commissioner of Internal Revenue considered the said claim for refund so filed and by his letter dated September 11, 1928, advised the claimant that the said claim would be rejected in full.

12. The said sum of $47,871.03, representing additional tax and interest thereon, so paid to the said Collector of Internal Revenue, is wrongfully withheld from the claimant for the reason that it was collected from the claimant against his will and over his protest after the expiration of the statutory period allowed therefor by Section 9(a) of the said Revenue Act of 1916 and Section 250(d) of the said [fol. 5] Revenue Act of 1921 and the said amount so paid is, therefore, illegally withheld from the claimant.

13. Included in the said sum of $47,871.03 is the said sum of $40,959.73, representing the amount of additional tax and interest so collected from the claimant in excess of the sum of $6,911.30 agreed upon by the claimant and the Commissioner of Internal Revenue as the correct tax liability in the said document dated November 15, 1920, which said document is a contract and is binding on the claimant and the Commissioner of Internal Revenue as to both the amount of the additional tax due and as to the time it could be legally assessed and collected and being a contract properly entered into by the parties on November 15, 1920, remains in full force and effect.

14. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The claimant has at all times borne true allegiance to the Government of the United States. He has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. He is and always has been the sole and absolute owner of the claim here presented. He has made no transfer or assignment of said claim or of any part thereof or of any interest therein. He is justly entitled to the amount claimed from the United States of America, after allowing all just credits and set-offs.

15. The claimant believes the facts as hereinabove stated to be true.

Wherefore the claimant prays judgment against the United States of America upon the facts and law for

[fol. 6] $47,871.03, together with interest thereon from the several dates of payment, and its reasonable costs and disbursements.

Percival E. Magee, Claimant. Theodore B. Benson, Attorney for Claimant.

Duly sworn to by Percival E. Magee. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO PETITION

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Percival E. Magee, hereby waive the three-year limitation in regard to the assessment of additional taxes for the year 1916 to the amount of $6,911.30 as disclosed by the investigation made for that year by Revenue Inspector B. C. Middleton.

(Signed) Percival E. Magee. D. H. Blair, Commissioner.

This November 15, 1920.

[fol. 8] II. GENERAL TRAVERSE—Filed January 21, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. ARGUMENT AND SUBMISSION

On December 5, 1929, this case was argued and submitted on merits by Mr. Theodore B. Benson, for plaintiff, and by Mr. Lisle A. Smith, for defendant.

[fol. 9] IV. Special Findings of Fact, Filed January 20, 1930, as amended by the order of February 17, 1930, Conclusion of Law, and Opinion of the Court by Green, J.

Mr. Theodore B. Benson for plaintiff. Mr. Lisle A. Smith, with whom was Mr. Assistant Attorney General Herman J. Galloway, for defendant.

This case having been heard by the Court of Claims, the court, pursuant to the stipulation of facts entered into by the parties hereto, makes the following

SPECIAL FINDINGS OF FACT

In February, 1917, plaintiff made his return of income taxes for the year 1916 to the Commissioner of Internal Revenue and reported therein taxes in the sum of $10,419.35, which was accordingly paid by plaintiff. Later the commissioner audited this return and assessed additional taxes against plaintiff in the amount of $6,911.30. On November 15, 1920, plaintiff executed a waiver of the three-year limitation in regard to the assessment of additional taxes to the amount of $6,911.30 for the year 1916, as above set forth, which waiver was also signed by the commissioner. Thereafter, the commissioner made a further examination and redetermined the amount of the additional tax; and instead of $6,911.30, fixed it at $64,982.12, which was assessed in the month of October, 1921. After receiving from the collector of internal revenue a ten-day notice and demand for payment, the plaintiff, on November 15, 1921, filed with the collector a claim in abatement of the said sum of $64,982.12, which claim was forwarded by the collector to the commissioner, and by the commissioner considered. By letter dated April 19, 1923, the plaintiff was advised that the commissioner proposed to allow said claim in the amount of $18,960.40 and reject it in the amount of $46,021.71.

On receipt of a claim in abatement, it was common practice to hold up the collection of an additional assessment. The collector of internal revenue acted in accordance with this practice in this case, and in the exercise of his discretion actually held up the collection of the additional assessment, and forwarded the said claim to the Commissioner of Internal Revenue in due course. The collector made no

further endeavor to collect the amount covered by the claim in abatement until after the claim had been finally adjusted by the Commissioner of Internal Revenue.

[fol. 10] The plaintiff protested the determination of the commissioner, as above set forth, and his appeal was transmitted to the committee on appeals and review, which, after oral hearings, sustained the commissioner upon all points except one, on August 9, 1923. In compliance with the recommendation of said committee, a certificate of overassessment in the amount of $21,952.28 was prepared and issued to the plaintiff by the commissioner; and on February 12, 1924, the commissioner formally allowed the claim in abatement in the amount of $21,952.28, and rejected it in the amount of $43,029.84, for which sum with interest the collector, on May 13, 1924, made demand on plaintiff. In compliance with this demand, the plaintiff made payment as follows:

May 23, 1924:	
Tax	$28,864.34
Interest	1,135.66
June 17, 1924:	
Tax	11,116.26
Interest	3,039.62
July 11, 1925:	
Tax	3,049.24
Interest	665.91
Total of tax and interest	47,871.03

On December 12, 1927, the plaintiff filed with the commissioner a claim for refund in the amount of $47,205.12, representing the said additional tax in the amount of $43,029.84, together with interest thereon. This claim for refund was considered by the Commissioner and rejected.

The parties agree that in this case there is no deficiency nor part of a deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234 of the revenue act of 1918 or the revenue act of 1921.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

This is a suit begun to recover $47,871.03, upon a claim for refund of taxes filed by the plaintiff on December 12, 1927, and rejected by the Commissioner of Internal Revenue.

The facts in the case are not in dispute. Plaintiff filed his individual income-tax return for the calendar year 1916 with the collector of internal revenue, and paid the amount shown to be due by the return in 1917. Thereafter, the Commmissioner of Internal Revenue audited the return and determined that an additional tax was due in the sum [fol. 11] of $6,911.30, and on November 15, 1920, the plaintiff and the commissioner signed a so-called waiver, by which plaintiff waived the three-year limitation in regard to the assessment of additional taxes for the year 1916, for $6,911.30. The additional assessment of $6,911.30, however, is only mentioned in the sequence of events as it has no bearing on the questions involved in the case, and the claim made by plaintiff that by signing the waiver the commissioner agreed that no change should be made in the assessment has no foundation in law or fact.

Thereafter the commissioner made a further examination of plaintiff's income-tax return, and during the month of October, 1921, made an additional assessment of $64,982.12, for which notice and demand for payment was sent to plaintiff, who thereupon on November 15, 1921, filed a claim in abatement for the full amount of such additional assessment.

The parties agree that upon receipt of the claim in abatement it was common practice to hold up the collection of an

additional assessment. Following this practice, the collector refrained from the collection of an additional assessment and forwarded the claim in abatement to the commissioner. The collector made no further endeavor to collect the amount covered by the claim in abatement until after the claim had been finally adjusted by the Commissioner of Internal Revenue.

The claim in abatement was formally allowed by the commissioner on February 12, 1924, in the amount of $21,952.28, and was rejected in the amount of $43,029.84, for which sum notice and demand was sent by the collector to the plaintiff May 13, 1924. Plaintiff discharged the demand by the payment thereof with interest in three installments, two in 1924 and one in 1925, the total amount of tax and interest so paid being $47,871.03.

As before stated, the plaintiff filed a claim for refund which was disallowed. The amount of this claim was $47,205.12, representing the additional tax of $43,029.84 together with interest thereon.

Two propositions are presented by plaintiff which constitute the issues in the case: First, that the assessment of the tax was illegal, being made after the expiration of the statute of limitations applicable thereto, which as plaintiff claims was a three-year period prescribed in section 9 (a) of the revenue act of 1916; second, that sections 607 and 611 of the revenue act of 1928 have no application to the facts in the case at bar, or if held to be applicable so as to deprive plaintiff of the right to maintain its action to recover the taxes in controversy section 611 is unconstitutional and void.

The contention that the assessment of the tax was illegal is based on the theory that the statute of limitations applicable to the assessment of the tax was section 9 (a) of the revenue act of 1916. We think it manifest that the period of limitations was that prescribed by the 1921 act. This act did not go into effect until November 23, 1921, but by its terms it was expressly made retroactive to January 1, 1921, and the assessment in controversy was made in October, 1921. The 1921 act repealed the provisions of the 1916 act which refer to the matters in controversy in this case and provided that the amount of any "taxes due under any return made under this act for prior taxable years or under

prior income, excess-profits, or war-profits tax acts * * * shall be determined and assessed within five years after the return was filed." In this case the taxes were due "under [fol. 12] prior income * * * tax acts." The 1921 act having been made retroactive with reference to assessments, its effect in this case was the same as if it had been enacted on January 1, 1921, and had been in force when the assessment was made. It therefore appears to us clear that the five-year limitation of the 1921 act applied, and that the assessment, having been made within five years from the time when the original return was made by plaintiff, was not barred by limitation. Defendant claims that, as applied to the facts in this case, there was no limitation provided by the 1916 act for the assessment of taxes. As we hold that the 1916 act does not apply, it becomes unnecessary for us to pass upon the point thus raised.

Discussing the second proposition presented by plaintiff, it will be observed that the tax involved herein was not collected until more than five years after the filing of the return and the defendant concedes that under the decision in Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, plaintiff can recover the amount so collected unless prevented by the provisions of sections 607 and 611 of the act of 1928. These two sections are set out in full and discussed at length in the case of Oak Worsted Mills v. United States, No. J-180, decided by this court December 2, 1929, but as there is a claim that the facts in this case are somewhat different from those in the Oak Worsted Mills case, supra, we again quote from the 1928 act these two sections, as follows:

"Sec. 607. Effect of Expiration of Period of Limitation against United States.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. Collections Stayed by Claim in Abatement.—If any internal-revenue tax (or any interest, penalty, ad-

ditional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Coming now to a consideration of the contention of the plaintiff that sections 607 and 611 of the act of 1928 have no application to the case at bar, we find that it is based on two propositions:

First, that the tax in question was not assessed within the period of limitations and hence is not covered by section 611.

Second, that section 611 applies only to cases where a claim in abatement was filed and the collection of the tax was thereby stayed.

Our views on the first of these two propositions have already been expressed and we have found that the tax being assessed under the 1921 act, was assessed "within the period of limitation properly applicable thereto" as required by section 611.

The second proposition has in most respects been discussed at length in the Oak Worsted Mills case, wherein we held that Congress in section 611 did not refer to a legal stay existing by virtue of the plea of abatement, for such a thing did not exist. At no time did the law contain [fol. 13] any provision for a plea of abatement bringing about a stay and at no time did it in fact legally stay the collection of the tax. Plaintiff's claim therefore is in substance that section 611 applies only to cases which never have arisen and never could arise. It has been said in some decisions that have been called to our attention that taxing statutes should be construed liberally in favor of the taxpayer, but this rule surely has some limits and ought not to be applied where the intent of Congress is so clearly manifest as it is in this matter. The report of the Ways and Means Committee upon the act of 1928, which

so far as it pertains to section 607 and 611, is set out in full in the Oak Worsted Mills case, shows very plainly what Congress intended. It states that—

"Prior to the enactment of the revenue act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment taxpayers were frequently *permitted* to file claims in abatement with the collector *and thus delay the collection* until the claim in abatement could be acted upon." (Italics ours.)

It thus appears that what Congress had in mind was the delay of the collector in collecting a tax brought about by the filing of the claim in abatement. The stipulation in the case at bar shows that it was the practice where a claim in abatement was filed to "hold up" the collection of the tax until the claim in abatement had been passed upon and that the collector acted in accordance with the practice in the instant case. The rule contended for by plaintiff with reference to the construction of statutes liberally can not, we think, be expanded so as to make the statute meaningless and useless, for this is not liberality of construction but extreme technicality. As we said in the Oak Worsted Mills case, the general rules with reference to construction of statutes require that they should be construed so as to give effect to the intent of the legislative body which enacted them. The intent is, we think, quite manifest from the language of section 611 itself, especially when it is applied to the situation which we have described above, under which claims in abatement never acted as a legal stay. If anything more is needed, it is found in the report of the committee, which definitely sets out the intent of the proposed law.

In one respect this case is different from that of the Oak Worsted Mills case. The assessment was made under the 1921 law and plaintiff calls attention to a provision in that act providing that in certain cases, "no claim in abatement of the amount so assessed shall be entertained." This provision is found in subdivision (d) of section 250. This subdivision provided that a taxpayer should be notified when a deficiency in a tax was discovered and given thirty days in which to file an appeal and show cause or reason why the tax or deficiency should not be paid; also that opportunity for hearing should be granted. When the

notice of the deficiency was served in the instant case, the plaintiff filed the claim in abatement which might be considered his showing of a "cause or reason why the tax or deficiency should not be paid." Until after there was a decision on this showing, there was nothing forbidding a claim in abatement to be entertained. The law required final decision to be made "as quickly as practicable," but "any tax or deficiency in tax then determined to be due" was then required to be paid within ten days after notice [fol. 14] and demand. Stated concisely, the statutory requirements were that when a deficiency was found, the taxpayer should be notified and given an apportunity to show cause why it should not be paid. No particular form was required for this showing, and it should be kept in mind that it is only after the determination and assessment of the tax that the statute says "no claim in abatement of the amount so assessed shall be entertained." There was nothing in the law forbidding the filing of a plea in abatement before determination and assessment, and plaintiff filed his plea in abatement after notice of the deficiency but prior to such determination. It was the common practice to so file pleas in abatement and have them considered before final determination of the tax was made. In fact, this was a perfectly logical and natural way for the taxpayer to present his claim that the taxes assessed against him ought to be reduced and there was nothing in the statute forbidding the taxpayer following this method in presenting his case. In the instant case the plea of abatement was considered by the commissioner and in part granted and in part refused, which action constituted the decision of the commissioner. Under the particular circumstances of this case, neither the statute nor the facts support the contention of plaintiff that the filing of the plea of abatement was forbidden by law.

The plaintiff contends that while this court has authority to determine a refund and enter judgment for its payment, it has no authority to determine an overpayment. But what is it that is refunded? Certainly nothing but an overpayment, and the finding of an overpayment is necessary in order to establish the right to a refund. All the works on income taxes so treat this matter. When suit is brought in this court on a claim against the United States,

if it is one within its jurisdiction, the court has power to adjudicate and determine all matters necessary to the establishment of the validity of the claim. The argument made by plaintiff on this point is without weight.

The plaintiff also contends that while section 1106 (a) of the act of 1926 was repealed as of the date of its enactment by the 1928 act, a right had been vested in plaintiff to bring this suit which could not be taken away by the repeal of the statute or by sections 607 and 611 of the act of 1928.

The questions arising on this point have been so fully discussed in the case of Gotham Can Co. v. United States, No. J-255, this day decided by this court, that we think nothing further need be added. We adhere to our conclusion in the case last named that section 1106 did not confer upon the plaintiff any right to maintain an action against the Government for taxes collected prior to the passage of the 1926 act unless the tax had been overpaid. As no such right was vested, none was taken away and therefore no constitutional principle is violated. The facts in the case at bar are precisely similar so far as the application of section 1106 is concerned.

It follows from what has been said that plaintiff's action must be dismissed and it is so ordered.

Williams, Judge; Littleton, Judge; Graham, Judge; and Booth, Chief Justice, concur.

[fol. 15] V. JUDGMENT

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

By the Court.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On February 8, 1930, the plaintiff filed a motion for correction of special findings of fact.

On February 17, 1930, the court entered the following order on said motion:

Order

Upon consideration of plaintiff's motion for modification of the Special Findings of Fact, it is ordered that the words "in the same year" following the word "later" in the fourth line of the Findings be stricken out, and the motion sustained to that extent, otherwise overruled.

February 17, 1930.

By the Court.

[fol. 16] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,892. Court of Claims. Term No. 761. Percival E. Magee, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed March 25, 1930. File No. 34,892.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 19, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted, the briefs and argument to be limited to the question of the effect and validity of Sec. 611, Revenue Act, 1928. It is also ordered that this case be, and the same is hereby, assigned for argument immediately following No. 589, Graham et al. vs. Goodcell, Former Collector.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

APR 14 193

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. [redacted]. 65

PERCIVAL E. MAGEE, PETITIONER,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

THEODORE B. BENSON,
Counsel for Petitioner.

(34,892)

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CASES CITED.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 761.

PERCIVAL E. MAGEE, PETITIONER,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

Opinion of the Court Below.

The opinion of the Court of Claims has not as yet been officially reported but will be found printed at R. 9–18.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3(6) of the Act of February 13, 1925 (43 Stat. 936).

The judgment of the Court of Claims was entered on January 20, 1930 (R. 18). Application for writ was presented March 25, 1930.

The suit brought in the Court of Claims is for the recovery of individual income tax erroneously and illegally assessed and collected (R. 2), jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

The Facts.

The facts of the case are printed in the petition (R. 2) and to avoid repetition counsel begs leave to refer to those pages which contain the shortest and plainest statement that he has been able to make.

IV.

The Statutes Involved.

Section 145 of the Judicial Code as applicable here reads as follows:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
> (1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, * * * in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *." (36 Stat. 1136.)

Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1926 and not changed by the Revenue Act of 1928, reads as follows:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of

filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 607 of the Revenue Act of 1928 reads as follows:

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 611 of the Revenue Act of 1928 reads as follows:

"*Collections Stayed by Claim in Abatement*—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed,with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

V.

Specification of Errors.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the reversal of the decision of the Court of Claims are:

1. The court below erred in holding that the consent of the

United States to be sued for the recovery of a tax illegally collected is conferred by Section 607 of the Revenue Act of 1928.

2. The court below erred in refusing to hold that the consent of the United States to be sued for the recovery of a tax illegally collected is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

3. After holding that the consent of the United States to be sued is conferred by Section 607 of the Revenue Act of 1928 and that the provisions thereof and of Section 611 of the same Act apply to a suit for the recovery of a tax illegally collected, the court below further erred in holding that this case comes within the provisions of Section 611 because:

a. The provisions of the section are not to be construed to be retroactive.

b. The tax in question was not timely assessed, having been assessed after the expiration of the three-year period defined in Section 9(a) of the Revenue Act of 1916 and before the enactment of the Section 250(d) of the Revenue Act of 1921.

c. Assuming the correctness of the decision below that Section 250(d) of the Revenue Act of 1921 is retroactive to January 1, 1921, then the holding that a claim in abatement was legally filed conflicts with the express terms of Section 250(d) which prohibits the filing of a claim in abatement.

d. The collection of the tax was never stayed by a claim in abatement, nor otherwise, the court having specially found that the collector of internal revenue acted in his own discretion in holding up the collection.

e. The tax was not voluntarily paid.

4. The court below erred in holding that Section 611 is constitutional.

VI.

The Argument.

Summary of Argument.

A. The period of limitation within which the tax in question legally could have been collected is that contained in Section 250(d) of the Revenue Act of 1921.

B. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The consent of the United States to be sued is given by Section 145 of the Judicial Code and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provision of Section 607 nor of the exception thereto in Section 611 of the same Act.

2. Section 611 of the Revenue Act of 1928 is not to be construed to be retroactive.

3. The tax in question was not timely assessed, having been assessed after the expiration of the three-year period defined in Section 9(a) of the Revenue Act of 1916 and before the enactment of Section 250(d) of the Revenue Act of 1921.

4. No lawful claim in abatement was ever filed.

5. The collection of the tax was never stayed by a claim in abatement nor otherwise, the court below having specifically found that the collector of internal revenue acted within his own discretion in holding up the collection.

6. The tax was forcibly collected from the petitioner and payment was not voluntary as contemplated by Congress by the use of the word "payment."

C. Section 611 of the Revenue Act of 1928 if construed to apply to this case would be unconstitutional because:

1. In the enactment of Section 611 Congress exceeded the power conferred on it by the Sixteenth Amendment to lay and collect taxes on incomes.

2. If Section 611 is construed to apply it would amount to the deprivation of property without due process of law and to the taking of property without just compensation.

Argument.

The decision below with reference to the provisions of Section 611 of the Revenue Act of 1928 conflicts directly with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *United States* v. *Burden, Smith & Co.*, 33 Fed. (2d) 229, and the questions in this case are substantially the same as those presented in the petition in the case of *Graham and Foster, Copartners, etc.*, v. *Goodcell, Collector*, No. 589, October, 1929, Term, in which this Court has granted a writ of *certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit.

The application for the writ in the *Graham and Foster* case was not opposed by the Attorney General and counsel therefore submits that the writ should be granted in this case.

Conclusion.

It is, therefore, respectfully submitted that this case, like that of *Graham and Foster, Copartners, etc.*, v. *Goodcell, Collector, supra,* is one calling for and demanding the exercise by this Court of its supervisory powers, in order that there may be a final determination and construction of the provisions of Section 607 and 611 of the Revenue Act of 1928 and that to such end the writ of *certiorari* should be granted and this Court should review the decision of the Court of Claims and finally reverse it.

THEODORE B. BENSON,
Counsel for Petitioner.